SYNERGISTIC DUO SDN BHD v. LAI MEI JUAN

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[CIVIL SUIT NO: WA-23CY-3-01-2017]
11 MAY 2017

***CIVIL PROCEDURE*:** *Injunction – Interim injunction – Application for interim injunction to restrain publishing of defamatory postings on social media until hearing and final disposal of defamation suit – Whether there was evidence of intention to publish impugned statements pending trial – Whether injunction ought to be granted*

***CIVIL PROCEDURE**: Locus standi – Tort – Application for interim injunction to restrain publishing of defamatory postings on social media until hearing and final disposal of defamation suit – Whether applicant had locus standi to bring action*

***TORT:** Defamation – Libel – Injunction – Application for interim injunction to restrain publishing of defamatory postings on social media until hearing and final disposal of defamation suit – Whether there was evidence of intention to publish impugned statements pending trial – Whether statements in postings had tendency to have defamatory meaning – Whether injunction ought to be granted – Whether defence of justification and/or fair comments prima facie likely to succeed at trial*

The plaintiff filed the present *ex parte* application, seeking an order of interim injunction to restrain the defendant whether by herself, her servants, agents or otherwise, howsoever, from publishing or causing to be published in her Facebook account, two postings ('the postings') or similar words which the plaintiff alleged were defamatory, in any manner whatsoever until the hearing and final disposal of the suit. The postings were in relation to the bad service by BGT Lakeview Restaurant ('the restaurant') operated by the plaintiff. The second posting went viral and were shared more than 9,500 times and was reposted and published in newspapers, websites, blogs and other Facebook pages. The High Court had earlier granted an *ad interim* injunction but the defendant failed to comply with the same and continued to publish or caused to be published the postings. The plaintiff submitted that: (i) because of the postings, many of its customers cancelled their bookings and reservations; and (ii) if the defendant was not restrained by way of an interim injunction, the plaintiff would continue to suffer grave irreparable loss and damage to its reputation and goodwill. The defendant raised a preliminary objection that the plaintiff was not an aggrieved party and did not have the *locus standi* to bring the present action against the defendant as: (i) her husband paid the booking fee to a bank account in the name of 'BGT Lakeview Sdn Bhd' and not the plaintiff; and (ii) as the defendant had entered into a contract with 'BGT Lakeview Lakeview Sdn

A Bhd', the plaintiff did not have a cause of action against the defendant. The defendant pleaded the defence of justification and/or fair comments, arguing that the postings were a matter of a public interest to ensure that others were not deceived by the restaurant's advertisements. The issues that arose for the court's adjudication were: (i) whether the plaintiff had the *locus standi* to bring
B the action against the defendant; (ii) whether the impugned statements in the postings had a tendency to have defamatory meaning; (iii) whether the defendant's defence of justification and/or fair comments was *prima facie* likely to succeed at trial; and (iv) whether there was evidence of intention to publish the impugned statements pending trial and whether an injunction
C ought to be granted to restrain the defendant from continuing to publish the postings.

Held (allowing application):

(1) The official Companies Commission of Malaysia search results showed that the plaintiff and the restaurant were related companies as both
D companies shared common directors and all the shares in the restaurant were held by the plaintiff's directors. Therefore, the plaintiff was the operator of the restaurant and accordingly, owned the reputation and goodwill of the restaurant. The doctrine of privity of contract did not apply in this case as the plaintiff's cause of action against the defendant
E was for the tort of defamation; not for breach of contract. The defendant's preliminary objection was not allowed. (paras 32, 34 & 37)

(2) The defendant's statement in the postings were defamatory of the plaintiff. An ordinary person's understanding of the postings would be that: (i) many customers were disappointed with the food and service at
F the restaurant; (ii) the defendant was cheated by the plaintiff; and (ii) if the ordinary and reasonable person dined at the restaurant, he or she would be subjected to bad food and bad service and would be cheated by the plaintiff. Any reasonable person reading the postings would understand them in defamatory sense. (paras 45-47)

G **(3)** The defendant failed to adduce any evidence to support her contention of the events that transpired in the postings. The defendant failed to establish that her defence of justification on balance of probabilities was true or substantially true. In addition to that, the defendant did not provide any evidence to show that her comments at the time of
H publishing the postings were made based on true facts and without malice. The defendant's defence of justification and/or fair comment was, *prima facie*, unlikely to succeed. (paras 58, 65, 66, 67 & 73).

I

(4) The defendant continued to publish the postings on her Facebook account notwithstanding the *ad interim* injunction ordered by the court restraining her from publishing or causing to publish the postings. Based on the presumption of fact under s. 114A of the Evidence Act 1950, she was presumed to continue publishing the postings unless she proved the contrary. The defendant's failure and/or refusal to comply with the *ad interim* injunction to date was evidence that she would continue to publish or cause to be published the postings until trial. The continued publication of the postings on the defendant's Facebook would cause the plaintiff to suffer further damage to their reputation and goodwill as the potential re-publication of the postings to potentially an unlimited number of internet users would irreparably harm the plaintiff's reputation. This harm could not be adequately compensated with damages. (paras 69-72).

Case(s) referred to:
Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152 HC ***(refd)***
Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***
Khalid Abdul Samad v. Datuk Aziz Isham & Anor [2011] 1 LNS 1161 HC ***(refd)***
Ngoi Thiam Woh v. CTOS Sdn Bhd & Ors [2001] 4 CLJ 765 HC ***(refd)***
Petroliam Nasional Bhd (PETRONAS) v. Khoo Nee Kiong [2003] 4 CLJ 303 HC ***(refd)***
Superboom Projects Sdn Bhd dan Satu Lagi lwn. Yap Seng Loong dan Lain-Lain [2009] 9 CLJ 155 HC ***(refd)***
Suwiri Sdn Bhd v. Government of The State of Sabah [2008] 1 CLJ 123 FC ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 1 LNS 146 HC ***(refd)***
Telnikoff v. Matusevitch [1991] 4 All ER 817 HL ***(refd)***
The New Straits Times Press (M) Bhd v. Airasia Bhd [1986] 1 LNS 80 SC ***(refd)***
Wong Yoke Kong & Ors v. Azmi M Anshar & Ors [2003] 6 CLJ 559 HC ***(foll)***
Worker's Party v. Tay Boon Too & Anor [1975] 1 LNS 193 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114A
Rules of Court 2012, O. 41 r. 5

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 28, para 166

For the plaintiff - Lim Jit Kiong; M/s JK Lim
For the defendant - Guok Ngek Seong; M/s Guok Partnership

Reported by Najib Tamby

A

JUDGMENT

Faizah Jamaludin JC:

Introduction

[1] The plaintiff had filed an *ex parte* application dated 23 January 2017 B (encl. 5) together with a certificate of urgency seeking an order of interim injunction to restrain the defendant whether by herself, her servants, agents or otherwise, howsoever, from publishing or causing to be published in her Facebook account, posting 1 and posting 2 or similar words which the plaintiff pleads are defamatory of the plaintiff, in any manner whatsoever C until the hearing and final disposal of this suit.

[2] On 31 January 2017, John Louis O'Hara J issued an *ad interim* injunction ("*ad interim* injunction") pending the *inter partes* hearing of the plaintiff's application for an interim injunction, which ordered as below:

D MAKA ADALAH DIPERINTAHKAN BAHAWA:

> Satu Perintah Injunksi *Ad Interim* untuk menghalang defendan Lai Mei Juan sama ada melalui diri sendiri, pengkhidmat-pengkhidmatnya, ejen-ejennya atau bagaimana juapun daripada menerbitkan atau mengakibatkan penerbitan Pernyataan Fitnah 1 dan Pernyataan Fitnah 2 (sepertimana Lampiran "A") atau perkataan-perkataan sama yang E menfitnah plaintiff, dalam apa-apa cara sekalipun sehingga perbicaraan dan pelupusan muktamad Lampiran 5 secara *inter partes*.

[3] The plaintiff had served, by way of personal service, the *ad interim* injunction on the defendant on 6 February 2017.

F **[4]** On 25 April 2017 this court heard the plaintiff's application *inter partes* and after reading the written submissions and hearing the oral submissions of counsel for the plaintiff and the defendant, I reserved judgment to today.

Salient Facts

G **[5]** The plaintiff is a private limited company with its registered address at 31A, Jalan Satu, Kawasan 16, Berkeley Town Centre, 41300 Klang, Selangor and business address at C-06-1, C-06-2 and C-06-3, Block C, Plaza Kelana Jaya, Jalan SS 7/13A, Kelana Jaya, 47301 Petaling Jaya, Selangor.

[6] The defendant is an individual and uses the name "Lai Mei Juan" on H her Facebook account.

[7] On 22 December 2016, the defendant's husband, Jerry Ong, made a booking at a restaurant known as "BGT Lakeview Restaurant" in SS 7, Kelana Jaya ("the restaurant") and paid a booking fee of RM105.20 to BGT Lakeview Sdn Bhd. The booking was confirmed for two people at 8pm to I be seated at table no. B17.

[8] On 25 December 2016, the defendant and her husband attended the restaurant but neither of them dined or ate at the restaurant.

[9] On or around 25 December 2016, the defendant published or caused to be published posting 1 in her Facebook account. Posting 1 contained edited photographs of the restaurant and the following words:

(a) "Never come to BGT Lake view at SS7!!"

(b) "This is my conversation wit the person in charge named JOYCE!

Me: i have made early dinner reservation n paid the same deposit amount as other ppl total cost rm100+ why i been arrange to sit at this type of shaking table n chair ya? Macam mamak chair.. Ur advertisement not like tat de wor..

J: u coming here for food only. If u wan nicer chair, u should go ikea!

Me: this is not the same as u promote in ur advertisement. N I feel cheated and the environment not the same.

J: u know is advertisement dy la! KFC chicken advertisement oso not same la.. n the lake is still here. The environment still same!

Me: so now u r saying u cheating on ur customer lar! I wan my refund.

J: sorry, no refund as we already stated in the reservation term."

(c) "And u r doing service. U giving such manner to ur customers! I can only pray for ur business going to hell!! Fxxk ur!"

(d) "BAN BGT Lake View!"

[10] On or around 26 December 2016, the defendant published or caused to be published posting 2 in her Facebook account ("posting 2") with content that is almost similar as posting 1. Posting 2 was in the Chinese language. A true and accurate translation of posting 2 in Bahasa Malaysia is as below:

(a) "Kalian jangan di tipu oleh Kelana Jaya SS7 BGT Lake View lagi."

(b) "Tetapi masih juga ada kawan internet yang lain amat marah dan beritahu saya mereka terpaksa tunggu dengan begitu lama baru di hidang makanan, makanan juga sangat tak sedap, berbeza dari gambar, mereka amat kecewa."

(c) "Fikirlah, makan malam RM210 untuk 2 orang. Bukan murah sangat. Harga ini dan di atur duduk di tempat begitu. Memanglah (emoji). Cara perkhimatan teruk sangat."

(d) "Ini merupakan perbualan saya dengan beliau.

Saya: Saya telah tempah meja. Dah bayar jumlah yang sama dengan orang yang duduk di sana, kenapa tempat duduk kami tak sama? Juga tidak sama dengan gambar.

J: Ada datang untuk makan saja! Nak yang cantik, pergilah Ikea beli!

Saya: Ini tidak sama langsung dengan iklan anda, saya rasa anda tipu kami. Kalaulah ramai pelanggan sangat, tidak dapat duduk yang sama, haruslah beritahu kami terlebih dahulu semasa kami buat tempahan.

J: Apa yang tak sama? Tasik masih ada! Kan anda kata iklan! Adakah ayam KFC yang anda makan sama dengan iklan?!

Saya: Sekarang anda menipu. Saya nak balik wang deposit saya.

J: Tidak boleh! Kami tidak boleh kembalikan. Sudah tulis atas nota tempahan."

(e) "Tetapi saya tidak mahu orang lain tertipu pada masa akan datang, dan meraikan hari perayaan dengan muram. Terutamanya kita semua ingin makan riang. Seperti pada hari perayaan yang begitu penting hari Natal, hari Kekasih dan lain-lain."

[11] Posting 2 went viral[1]. It was shared more than 9,500 times on facebook and was reposted and published in newspapers, websites, blogs and other Facebook pages including Guang Ming Daily, Huarenwang [www.huarenpost.blogspot.com] and Damatoutiao [damatoutiao.com] (where it was shared about 18,000 times). Posting 2 and the re-postings are currently still accessible to the public at large.

[12] The plaintiff had on 29 December 2016, through their solicitors, issued a notice of demand to the defendant demanding, *inter alia*, that the defendant:

(i) immediately cease and desist from further defaming the plaintiff;

(ii) immediately remove the defamatory statements and photographs of the plaintiff from the posting;

(iii) publish and display a full and complete notice of withdrawal and apology;

(iv) give an assurance and undertaking in writing that the defendant will not repeat the publication of the defamatory statement or similar allegations against the plaintiff; and

(v) compensate the plaintiff by way of damages.

[13] The defendant replied the plaintiff, through her solicitor's letter dated 24 January 2017, stating that she would be relying on the defence of justification and fair comment.

[14] The defendant has not complied with the *ad interim* injunction and continued to publish or caused to be published posting 1 and posting 2 to date.

Plaintiff's Case

[15] The plaintiff pleads that at all material times, it is the operator of the restaurant. For the reasons pleaded in the statement of claim, the plaintiff claims that it has acquired an excellent reputation and valuable goodwill in the restaurant and food and beverage industry since 2007 and that it has more than 31,900 followers in its Facebook account at the date of the writ of summons in this suit.

[16] The plaintiff pleads that posting 1 and posting 2 are manifestly defamatory and that in their natural and ordinary meaning and/or in the alternative, by way of innuendo, meant and/or were understood to mean that:

(i) the plaintiff was dishonest and/or untrustworthy;

(ii) the plaintiff has cheated its customers and/or committed a criminal offence;

(iii) the plaintiff's restaurant was terrible;

(iv) the plaintiff's food was bad/terrible; and

(v) the plaintiff's service was terrible.

[17] The plaintiff avers that because of the defendant's act in publishing posting 1 and posting 2, many of the plaintiff's customers cancelled their bookings and reservations at the plaintiff's restaurant. It claims that the nature of the damage caused by the defendant's postings in posting 1 and posting 2 is so severe that damages would not be an adequate remedy.

[18] The plaintiff submits that if the defendant is not restrained by way of an interim injunction, the plaintiff would continue to suffer grave irreparable loss and damage to its reputation and goodwill.

Defendant's Case

[19] The defendant raises a preliminary objection that the plaintiff is not an aggrieved party and thus does not have *locus standi* to bring this action against the defendant. The defendant pleads that her husband had paid the booking fee of RM105.20 to a bank account in the name of "BGT Lakeview Sdn. Bhd." and not the plaintiff. The defendant submits as the defendant had entered into a contract with "BGT Lakeview Sdn. Bhd.", it is "BGT Lakeview Sdn. Bhd." and not the plaintiff that has a cause of action against the defendant. The defendant cites the case of *Suwiri Sdn Bhd v. Government of The State of Sabah* [2008] 1 CLJ 123; [2008] 1 MLJ 743 as authority for

A their argument that under the doctrine of privity of contract, a contract cannot confer rights or impose obligations on persons who are not parties to the contract.

[20] The defendant admits publishing posting 1 and posting 2. However, she does not admit that the postings conveyed the meanings pleaded by the B plaintiff. She denies that the postings were maliciously published with the intent to defame the plaintiff and pleads that posting 2 going viral was not within her control.

[21] The defendant pleads the defence of justification and avers that the contents of posting 1 and posting 2 really happened on the night in question[2]. C She denies that she published the postings maliciously with intent to defame the plaintiff[3].

[22] The defendant pleads that after posting 2 went viral, on 27 December 2017 (Note: this date in the defendant's statement of defence is incorrect as D it is date that has yet to take place. I have assumed for purposes of this judgment that the date is a typographical error and that the defendant meant to plead 27 December 2016] the defendant's husband (Jerry Ong) received a WhatsApp message from a Mr Teh. The WhatsApp exchange between the Jerry Ong and Mr Teh read as follows:

E

Mr. Teh:	Gd. Afternoon Jerry, this is Mr. Teh, the owner of BGT Lakeview. Firstly, we would like to extend our sincere apology on your seating arrangement complaint on 25th December at our premise.
	Hence, our management intends to dissolve this matter by trying to reach an agreement with you and your partner, to see whether both of you intend to solve it privately.
	Hope to hear from you soon. Have a blessed day and fruitful day.
Jerry:	Hi and good evening Mr. Teh, what seems to be on your mind sir. It has been a real eye opener as your customer to receive such overwhelming services from your professional colleague. Don't mean to be rude but it was really shocking to hear phrases such go buy your own furniture from Ikea if you are not happy with what we provide. Please kindly advise your opinion as a restaurant owner and also a consumer. Thanks.

F

G

H

[23] It is not disputed that Mr Teh is Teh Chuan Khoon who is one of the plaintiff's directors. He is also a director and shareholder of BGT Lakeview I Sdn Bhd.

[24] The defendant posted the WhatsApp message from Mr Teh on her Facebook page. She pleads that the message shows the restaurant's admission that what happened to the defendant and her husband on "25 December 2017" is true (Note: the date of "25 December 2017" is incorrect and I have made the same assumption as stated in para. [22] above). The defendant's claim is denied by the plaintiff who pleads that Mr Teh in the WhatsApp message had apologised for the seating arrangement and wanted to privately settle any dissatisfaction that Jerry Ong has in relation to the seating arrangement.

[25] The defendant avers that the 3,600 comments she received after publishing posting 2 on Facebook supports her statement.

[26] The defendant pleads that posting 1 and posting 2 are fair comments on a matter of public interest: they were published to ensure that others were not deceived by the restaurant's advertisements and that the public as consumers have the interest and/or right to know the truth about the quality of the restaurant's service[4].

[27] She pleads that the 3,600 comments she received after publishing posting 2 on Facebook supports the defence of fair comment as the other readers also faced the same issues as the defendant.

Analysis

[28] The questions before this court are:

A. Whether the plaintiff has *locus standi* to bring this suit against the defendant; and

B. Whether an injunction ought to be granted to restrain the defendant from continuing to publish posting 1 and posting 2.

Does The Plaintiff Have Locus Standi To Bring An Action For Defamation Against The Defendant?

[29] The plaintiff pleads that at all material times, it is the operator of the restaurant and submits that it owns the reputation, goodwill, trademark and assets of the restaurant.

[30] The plaintiff avers that BGT Lakeview Sdn Bhd is an investment arm of the plaintiff and has the same management as the plaintiff. The official Suruhanjaya Syarikat Malaysia ("SSM") search results exhibited in the plaintiff's affidavit in support[5] (affirmed by one of the plaintiff's directors, Yiap Shed Li) shows that the plaintiff's nature of business is "Restaurant Operator" with a paid-up capital of RM500,000. The SSM search results for BGT Lakeview Sdn Bhd[6] shows that its nature of business is "Dormant" and its paid-up capital is RM2. The SSM search results also show that both the

A plaintiff and BGT Lakeview Sdn Bhd have the same directors (ie, Teh Chuan Khoon and Yiap Shed Li) and that both directors are the shareholders of BGT Lakeview Sdn Bhd.

[31] The plaintiff avers that all the booking deposits for the restaurant are paid into the account of BGT Lakeview Sdn Bhd for accounting reasons. The
B plaintiff claims that as it is subject to goods and services tax ("GST"), if booking deposits are paid directly into the plaintiff's account, their customers would be subject to a double tax charge: first, when they pay the booking deposit and second, when they pay the balance of the invoice after the meal. This is because the plaintiff has a "point of sales" system at the restaurant,
C which can only capture the current payment and not the deposit paid earlier.

[32] The SSM searches show the plaintiff and BGT Lakeview Sdn Bhd are related companies as both companies share common directors and all the shares in BGT Lakeview Sdn Bhd are held by the plaintiff's directors. For this reason, I am satisfied based on the evidence before me that the plaintiff
D is the operator of the restaurant and accordingly, owns the reputation and goodwill of the restaurant. I also find that the statements in posting 1 and posting 2 refers to the plaintiff.

[33] The defendant argues that as her husband had paid the deposit to
E "BGT Lakeview Sdn. Bhd." the contract is between "BGT Lakeview Sdn. Bhd." and not the plaintiff. Therefore, she argues it is "BGT Lakeview Sdn. Bhd." that has a cause of action against the defendant

[34] The defendant's preliminary objection is premised on the legal principle that under the doctrine of privity of contract, a third party does not
F have any rights and obligations under a contract. However, in this case, the plaintiff's cause of action against the defendant is for the tort of defamation. It is not for breach of contract. Therefore, the doctrine of privity of contract does not apply to this action.

[35] It is trite law that in an action for defamation, the onus lies on the
G plaintiff to establish, on the balance of probabilities, that the impugned statement published referred to the plaintiff and that it had defamatory imputations. There must be publication of the alleged defamatory statement and it is publication as soon as it is published to a third person: see *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 MLJ 315.)

H **[36]** The defendant admits that she had published both posting 1 and posting 2 on her Facebook account. It is not disputed that the postings were published to third persons. For the reasons set out in paras. [29] to [32] above, I find that the impugned statements refer to the plaintiff.

I

[37] Therefore, for these reasons, I disallow the defendant's preliminary objection.

B. Whether An Interim Injunction Ought To Be Granted To Restrain The Defendant From Continuing To Publish Posting 1 And Posting 2?

[38] The defendant relies on the Supreme Court decision in *The New Straits Times Press (M) Bhd v. Airasia Bhd* [1986] 1 LNS 80; [1987] 1 MLJ 136 (which was followed by the High Court in *Ngoi Thiam Woh v. CTOS Sdn Bhd & Ors* [2001] 4 CLJ 765; [2001] 4 MLJ 510 and *Superboom Projects Sdn Bhd dan Satu Lagi lwn. Yap Seng Loong dan Lain-Lain* [2009] 9 MLJ 368; [2009] 9 CLJ 155; [2008] 1 LNS 815) to support its contention that interim injunctions should not be granted in defamation suits.

[39] In *The New Straits Times v. Airasia* case, the Supreme Court confirmed that in law the High Court has the power to grant an interlocutory injunction to restrain a defendant in a defamation action. Abdul Hamid Ag LP in delivering the decision of the Supreme Court[7] quoting from *Halsbury's Laws of England*, 4th edn, vol. 28 para. 166 said:

> There is, in law, no doubt that the High Court may grant an interlocutory injunction restraining the defendant, whether by himself or by his servants or agents or otherwise, from publishing or further publishing matter which is defamatory or of malicious falsehood. It is not necessary to show that there has already been an actionable publication or that damage has been sustained. In appropriate cases an injunction may be granted ex parte and before the issue of a writ.

[40] In exercising the discretion, Abdul Hamid Ag LP cautioned that the court should exercise its discretion judicially and should balance the freedom of speech which is related to the freedom of the press against the reputation of a single individual who, if wronged, can be adequately compensated in damages. He said that:

> The Court should act cautiously in granting interim injunction to restrain publication of an alleged defamatory statement.[8]

[41] Following the decision in *New Straits Times v. Airasia* case, Abdull Hamid Embong J (as he then was) in *Ngoi Thiam Woh v. CTOS Sdn Bhd* [2001] 4 CLJ 765; [2001] 4 MLJ 510 held that the court should be slow in granting interim injunctions in a defamation action and that the court may only grant interim injunctions in a defamation action if (i) the statement is unarguably defamatory; (ii) there are no grounds for concluding that the statement may be true; and (iii) there is evidence of an intention to repeat or publish the defamatory statement.

[42] The plaintiff relying on the decision in *Petroliam Nasional Bhd (PETRONAS) v. Khoo Nee Kiong* [2003] 4 CLJ 303; [2003] 4 MLJ 216 submits that this court should grant the interlocutory injunction restraining the defendant from further publishing posting 1 and posting 2 because both postings are manifestly defamatory. In the *PETRONAS* case, the learned Judicial Commissioner granted an interim injunction to restrain the defendant from further publishing the impugned statements on the internet as she found that the impugned statements were manifestly defamatory and that publication or further publication of the impugned statements would cause the plaintiffs to suffer

> immediate and irreparable injury and damage to the plaintiffs' trading reputation because the impugned statements could be further published to an unlimited number of internet users including local and foreign players and corporations. Therefore, an interlocutory injunction should be granted to restrain the defendant from further defaming the plaintiffs on the internet which is a borderless unrestricted environment or elsewhere.[9]

[43] In deciding whether or not this court should grant an interim injunction restraining the defendant from publishing posting 1 and posting pending trial, this court must first establish:

(i) whether the impugned statements in posting 1 and posting 2 have a tendency to have a defamatory meaning?;

(ii) whether the defendant's defence of justification and/or fair comments is *prima facie* unlikely to succeed at trial?; and

(iii) whether there is evidence of intention to publish the impugned statements pending trial?.

(a) Do The Impugned Statements In Posting 1 And Posting 2 Have A Defamatory Meaning?

[44] In deciding whether the impugned statements in posting 1 and posting 2 have a defamatory meaning, this court takes guidance from:

(1) the judgment of Mohd Azmi J (as he then was) in *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56 where he said:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the Plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the Plaintiff in the estimation of right-thinking members of society generally?

and

(2) the judgment of Helilah Yusof J (as she then was) in *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors* [2003] 6 CLJ 559; [2003] 4 MLJ 96 where she held that:

> There are therefore two steps involved in deciding whether or not the alleged offensive sentence is defamatory or not. The first is to consider what meaning the words would convey to the ordinary person. Having established the meaning the next stage is whether under the circumstances in which the words were published, the reasonable person would be likely to understand them in a defamatory sense. The abstraction or measuring stick of an ordinary man is but a measure to strike a balance between freedom of speech and the safeguard of reputation.[10]
>
> …
>
> An imputation is defamatory if it tends to lower a person in the estimation of others when it affects any aspect of his reputation.[11]

[45] Applying the two-step test in *Wong Yoke Kong* to this case, I find that an ordinary person's understanding of posting 1 and posting 2 would be that:

(i) many customers are disappointed with the food and service at the restaurant;

(ii) the defendant was cheated by the plaintiff; and

(iii) if the ordinary and reasonable person dined at the plaintiff's restaurant he/she would be subjected to bad food and bad service and would be cheated by the plaintiff.

[46] In my view, any reasonable person reading the posting 1 in the defendant's Facebook page and posting 2 in the newspapers, websites, blogs and Facebook pages in which the posting was published and re-published, would understand them in the defamatory sense. It can be reasonably inferred from the comments which the defendant says she had received after publishing posting 2 (some of which are exhibited as exh. "F" in her affidavit in reply dated 17 February 2017) shows that those who had read posting 2 understood the posting in the defamatory sense.

[47] After having considered the natural and ordinary meaning of the impugned words used and having regards to what meaning and understanding they would convey to the ordinary and reasonable person, this court finds that the defendant's statement in posting 1 and posting 2 are defamatory of the plaintiff.

A *(b) Whether The Defendant's Defence Of Justification And/Or Fair Comments Is Prima Facie Unlikely To Succeed At Trial?*

Defence Of Justification

[48] *Defamation Principles and Procedure in Singapore and Malaysia*[12] states:

B

> To succeed in the defence of justification, the defendant has to prove that the defamatory imputations are true in substance and in fact. This is done in two parts: the defendant has to plead and prove the defamatory meanings which he will be justifying, and the facts that support the same.

[49] It was held in *Worker's Party v. Tay Boon Too & Anor* [1975] 1 LNS 193; C [1975] 1 MLJ 47, that to establish a plea of justification, the defendant must: (i) prove the defamatory imputation is true; (ii) justify the precise imputation complained of; and (iii) prove the truth of all material statements in the libel.

[50] The Court of Appeal explained in *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560; [2014] D 4 MLJ 242, the burden that has to be discharged in proving justification. Abang Iskandar JCA in delivering the decision of the Court of Appeal said as follows:

> [24] Again, perhaps we should go back to what in essence is required to E be established by a defendant who is desirous of putting up a defence of justification in facing up a defamation suit. In relying on the defence of justification, the burden of proof is on the defendant to prove that the allegations made are true or are substantially true. **The defendant must prove it on the balance of probabilities, that is, the allegation is more likely than not to be true.** For example, an allegation published by repeating a rumour cannot be justified by proving that there was such a F rumour. **A defendant is required to prove the substance of the allegation.** Since the burden of proving the truth of an allegation is on the defendant, claimants enjoy a distinct advantage in defamation claims. Justification has to be used with great care. It can often be difficult to obtain sufficient admissible evidence to persuade the judge that the statement is true. This G will sometimes result in the media being unable to publish allegations which are generally believed to be true, but which they may not be able to prove to the standard required in court. Further, an unsuccessful defence of justification is likely to increase the level of any damages awarded.
>
> [25] But once the defence is successfully established, it affords a complete H defence against a defamation suit by a claimant. It is not necessary for a defendant to show that there was a public interest in publication and it does not matter whether he or she acted maliciously. The law recognises that to be the case because the defendant has established the truth of what he had stated however defamatory it has been against the I plaintiff.
>
> (emphasis added)

[51] In this present case, the defendant pleads that the statements in posting 1 were based on the defendant's and her husband's experience at the restaurant. The plaintiff denies the defendant's claim and pleads that the person named Joyce in posting 1 had explained to the defendant that all the tables are booked and they had to wait if they wanted another table. Yiap Shed Li in the plaintiff's affidavit in reply, averred that she is known as "Joyce" and that she denies the defendant's allegations.

[52] Apart from the defendant's averment in her affidavit in reply that the statements in posting 1 is based on her and her husband's experience at the restaurant and her conversation with a person named "Joyce", which averment is denied by Yiap Shed Li (a.k.a. Joyce) in her affidavit, the defendant did not adduce any evidence to substantiate the truth of her allegation.

[53] It is not disputed that the statements in posting 2 are substantially the same as the comments in posting 1 except for the additional statements:

(a) "Kalian jangan di tipu oleh Kelana Jaya SS7 BGT Lake View lagi."

(b) "Tetapi masih juga ada kawan internet yang lain amat marah dan beritahu saya mereka terpaksa tunggu dengan begitu lama baru di hiding makanan, makanan juga sangat tak sedap, berbeza dari gambar, mereka amat kecewa."

(c) "Fikirlah, makan malam RM210 untuk 2 orang. Bukan murah sangat. Harga ini dan di atur duduk di tempat begitu. Memanglah (emoji). Cara perkhimatan teruk sangat."

[54] It is the defendant's case that posting 2 was based on comments from other internet users who claim that they were customers of the restaurant and not from her actual experience of eating the food and dining at the restaurant. The defendant averred that posting 2 is true and that it is substantiated from 3,600 comments after she had published posting 2. The defendant included copies of some of the comments she received in exh. F of her affidavit in reply.

[55] It is not disputed that at all material times, the defendant and her husband neither dined nor ate any food at the restaurant. The defendant admitted in her affidavit in reply that after the alleged encounter with Joyce at the restaurant, the defendant and her husband were no longer interested in having dinner at the restaurant.

[56] To successfully establish the defence of justification, the defendant must adduce evidence to prove that the allegations made in posting 1 and posting 2 are true or substantially true. Mere averments are insufficient to discharge the defendant's burden of proof. The Federal Court held in *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86 that the burden of proof for the defence of justification does not shift and remains with the defendant throughout.

[57] Publishing a statement based on comments she received from other internet users is insufficient to discharge the defendant's burden of proof that the impugned statement was true or substantially true. In the case of *Khalid Abdul Samad v. Datuk Aziz Isham & Anor* [2011] 1 LNS 1161; [2012] 7 MLJ 301, Prasad Abraham J (as he then was) ruled as follows:

> [19] In this case, the evidence is clear that the second defendant just picked up the article of YB Zulkifli Noordin from his official blog and republished it in toto without any verification of the article at all. The second defendant maintains that the impugned article was extracted from the official blog of YB Zulkifli Noordin and as he was MP, it was thought safe to rely on it. The court rejects that argument *in toto*.

[58] Based on the affidavits before me, I find that the defendant had failed to establish that her defence of justification on a balance of probabilities was true or substantially true for the following reasons:

(i) she failed to adduce any evidence to support her contention that the events and conversation between her and Joyce on 25 December 2016 evening was as she had stated in posting 1 and posting 2;

(ii) she failed to verify the truth of the comments she received from the internet users who claimed to have been customers of the restaurant prior to publishing posting 2 as a basis of her genuine belief that the impugned statement she had published in posting 2 was true or was substantially true.

[59] With regards to comments from the internet users exhibited in the defendant's affidavit in reply to support her defence of justification, the defendant's counsel submitted that under O. 41 r. 5 of the Rules of Court 2012, an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds thereof.

[60] With respect to the defendant's counsel, the issue here is not that the hearsay evidence is used in the affidavit but that the comments exhibited in exh. F of the defendant's affidavit in reply are comments the plaintiff received after posting 2 went viral. The defendant did not exhibit in any of her affidavits, any of the comments she claims to have received after publishing posting 1 (but before publishing posting 2), which she says were the basis of her statements in posting 2.

Defence Of Fair Comment

[61] The Court of Appeal in *Dato' Seri Mohammad Nizar bin Jamaluddin v. Sistem Televisyen Malaysia* summed up the law on the defence of fair comment as below:

[50] The law on the defence of fair comment is that if a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment. The courts have said that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment.

[51] The comment must be based on true facts which are either contained in the publication or are sufficiently referred to. *It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail*. As with justification, the defendant does not to have to prove the truth of every fact provided the comment was fair in relation to those facts which are proved. *However, fair in this context, does not mean reasonable, but rather, it signifies the absence of malice.* The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held. If the claimant can show that the publication was made maliciously, the defence of fair comment will not succeed.

(emphasis added)

[62] The task of determining what is fact and what is comment is not easy, as alluded by Lord Ackner in the case of *Telnikoff v. Matusevitch* [1991] 4 All ER 817 HL where he said:

However, the fundamental question which remains is whether the words complained of in that letter were capable of being understood as a statement or statements of fact, since if they were, they were defamatory, there being no attempt to justify them. It is common ground that it is for the judge alone to decide whether the words complained of are capable of being a statement of a fact or facts and whether his ruling is right or wrong is a matter of law for the decision of an appellate tribunal. Drake J decided that the words were not so capable and his decision was upheld by the Court of Appeal. It is not always easy to draw the distinction between an expression of an opinion and an assertion of fact. The very same words may be one or the other according to their context. This point is cogently made in *Winfield and Jolowicz on Tort* 11th ed., (1979) where this example is provided:

> To say that 'A is a disgrace to human nature' is an allegation of fact, but if the words were 'A murdered his father and is therefore a disgrace to human nature' the latter words are plainly a comment on the former.

I do not take it to be disputed that whether the words complained of were reasonably capable of being understood as comment or a statement of fact must depend on a consideration of the whole of the words used, their context and the circumstances of publication. The vital issue in this case is – what is their context? ...

A **[63]** To succeed in a defence of fair comment, the defendant must prove all the following elements on a balance of probabilities:

(i) that the postings were comments not statement of facts;

(ii) the comments were made as a matter of public interest;

B (iii) the comments were based on true or substantially true facts; and

(iv) the comments were made without malice.

[64] In my view the question of whether the postings are a statement of fact or comment and whether they were made as a matter of public interest, are C matters that are better decided after hearing all the parties at trial rather than based on affidavits. Accordingly, for purposes of determining *prima facie* the likelihood of success of the defendant's defence of fair comment, I have tipped the scale towards the defendant's freedom of speech and made the assumptions that (1) the impugned statements are fair comments; and (2) they D were made as a matter of public interest. Based on these assumptions and the facts before me, I have to determine whether the defendant has discharged her burden of proof as regards the two other elements required for a defence of fair comment to succeed, namely that (3) the comments were based on true facts; and (4) they made without malice.

E **[65]** It is the defendant's case that the 3,600 comments she received after publishing posting 2 on Facebook supports her defence of fair comment. She has not provided any evidence to show that her comments at the time of publishing the postings were made based on true facts.

[66] In my view, the following expletives in posting 1:

F

"I can only pray for ur business going to hell!! Fxxk ur!"

"BAN BGT Lake View!"

would make it difficult for any objective and reasonable person to agree with the defendant's averment that the impugned statements were fair comments G and made without malice. She has not provided any evidence to prove that they were made without malice.

[67] Therefore, notwithstanding my assumption that posting 1 and posting 2 are comments made in the public interest, I find that defendant's defence of fair comment is *prima facie* unlikely to succeed. This is because the H defendant has failed to prove that the postings were based on true or substantially true facts and that they were made without malice.

I

(c) Whether There Is Evidence Of Intention To Publish The Impugned Statements Pending Trial?

[68] Section 114A of the Evidence Act 1950 provides three types of presumptions of fact in publication of contents on the internet, which are as follows:

114A: Presumption of fact in publication

(1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

(4) For the purpose of this section:

(a) "network service" and "network service provider" have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998; and

(b) "publication" means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer."

[69] It is not disputed that the defendant continues to publish posting 1 and posting 2 on her Facebook account, notwithstanding the *ad interim* injunction ordered by this court restraining her from publishing or causing to publish posting 1 and posting 2. She has failed and/or refused to comply with the *ad interim* injunction. There is currently an application by the plaintiff before this court (encl. 18)[13] for leave to commence an application for a committal order against the defendant for failing and/or refusing to comply with the *ad interim* injunction.

[70] Moreover, based on the presumption of fact under s. 114A of the Evidence Act she is presumed to continue publishing posting 1 and posting 2 unless she proves the contrary.

[71] This court finds that the defendant's failure and/or refusal to comply with the *ad interim* injunction to date is evidence that she will continue to publish or cause to be published posting 1 and posting 2 until trial.

A **Decision**

[72] For the reasons stated above, I find that the defendant's statements in posting 1 and posting 2 to be defamatory. I also find that the continued publication of posting 1 and posting 2 on the defendant's Facebook would cause the plaintiff's to suffer further damage to their reputation and goodwill
B as the potential re-publication of the postings to potentially unlimited number of internet users would irreparably harm the plaintiff's reputation: which harm cannot be adequately compensated with damages.

[73] I have taken cognizance of the caution expressed by the Supreme
C Court in *The New Straits Times Press (M) Bhd v. Airasia Bhd* that this court should exercise its discretion judicially and should balance the freedom of speech which is related to the freedom of the press against the reputation of the plaintiff. Based on the affidavits before me and for the reasons set-out above, I find that *prima facie* the defendant's defence of justification and fair comment is unlikely to succeed. In order to successfully prove justification
D and fair comment, the defendant would need to adduce evidence at trial to support her plea that the impugned statements are based on true facts and were made without malice. Furthermore, unlike the defendant in the *The New Straits Times Press (M) Bhd v. Airasia Bhd*, the defendant is not the press but a member of the public with a Facebook account. Her publications in her
E Facebook account are not subject to the same fact-checking and editorial process as that of a newspaper. Also, her Facebook posting, unlike an article published in a printed newspaper like The New Straits Times, can reach any person worldwide who visits her Facebook page. As the learned Judicial Commissioners observed in the *PETRONAS* case, the internet is a
F "borderless unrestricted environment". The damage that her continued publication of posting 1 and posting 2 can cause irreparable damage to the plaintiff's reputation which cannot be adequately compensated with damages. I have also taken account the fact that any interim injunction restraining her from publishing posting 1 and posting 2 on her Facebook would not restrain her from publishing other postings on her Facebook
G account. Also, as the plaintiff is a company with a paid-up capital of RM500,000, I am satisfied that the plaintiff would be able to honour its undertaking of damages for any damages suffered by the defendant due to any interim injunction granted against her, in the event she succeeds in proving the defence of justification or fair comment at trial.

H **Order**

[74] Accordingly, after weighing all the facts before me and balancing the defendant's freedom of speech and the continuing damage to the plaintiff's reputation with the continued publication of posting 1 and posting 2 on the
I defendant's Facebook, I hereby grant an interim injunction effective

immediately to restrain the defendant whether by herself, her servants, agents or otherwise, howsoever, from publishing or causing to be published in her facebook account, posting 1 and posting 2 (as pleaded in the plaintiff's statement of claim) or similar words which the plaintiff pleads are defamatory of the plaintiff, in any manner whatsoever until the hearing and final disposal of this suit.

[75] I order the defendant to pay the plaintiff damages of RM5,000 forthwith subject to payment of the allocator fee.

Endnotes:

1. "Viral" is defined in the Oxford English Dictionary to mean "an image, video, piece of information etc. that is circulated rapidly and widely from one Internet user to another."
2. See afidavit jawapan defendan at para. 8.16 and para. 9.
3. *Supra*. para 8.17 and para. 9.
4. Para. 12.18 of the statement of defence.
5. Exhibit "P1" to Yiap Shed Li's Affidavit Sokongan Plaintiff (encl. 7) dated 20 January 2017.
6. Exhibit "P11" to Yiap Shed Li's Affidavit Jawapan Plaintiff (encl. 14) dated 3 March 2017.
7. At [1987] 1 LNS 79; [1987] 1 MLJ 39.
8. At [1987] 1 LNS 79; [1987] 1 MLJ 39.
9. At [2003] 4 CLJ 331b-c.
10. At [2003] 6 MLJ 590h.
11. At [2003] 6 MLJ 594g.
12. Doris Chia, LexisNexis 2016
13. Under O. 52 r. 3 of the Rules of Court 2012